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OCTOBER TERM, 1978

Nos. 78-160, 78-161

ROY TIBBALS WILSON, ET AL.,  
v. *Petitioners*

OMAHA INDIAN TRIBE AND  
THE UNITED STATES OF AMERICA

STATE OF IOWA, ET AL.,  
v. *Petitioners*

OMAHA INDIAN TRIBE AND  
THE UNITED STATES OF AMERICA

**On Writ of Certiorari to the United States Court of Appeals  
for the Eighth Circuit**

**BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION  
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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## OPINIONS BELOW

The memorandum opinion of the District Court, together with its findings of fact and conclusions of law, is reported at 433 F. Supp. 57, 67 (N.D. Iowa 1977) and the opinion of the Eighth Circuit Court of Appeals is reported at 575 F.2d 620 (8th Cir. 1978).

## STATUTE INVOLVED

25 U.S.C. § 194 provides:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

## QUESTION PRESENTED

Whether 25 U.S.C. § 194, which places the burden of proof upon a "white person" in litigation over property rights when "an Indian" is a party on one side and a "white person" is on the other, applies when the United States as trustee and an Indian tribe are on one side and various landowners, including natural persons of undetermined race, corporate entities and a state, are on the other.<sup>1</sup>

<sup>1</sup> In supporting the petitions for a writ of certiorari herein, the American Land Title Association also urged review of the judgment and opinion of the Court of Appeals for the Eighth Circuit because Section 194 is unconstitutional on its face by its assignment of the burden of proof upon a racial basis in violation of the Fifth Amendment. In granting review, this Court restricted its consideration of the questions presented by the petitioners in this respect to the proper construction of Section 194 and therefore this brief is limited to that issue.

## INTEREST OF THE AMICUS CURIAE<sup>2</sup>

The American Land Title Association (ALTA) is the national trade association of the land title industry. Its approximately 2,200 members include land title insurers, their agents, abstracters and associate members. The principal function of the land title industry is to facilitate the safe, certain and efficient transfer of title to real estate in both residential and commercial transactions.

There is presently pending in numerous federal courts extensive Indian claims litigation for the recovery of land and for trespass or other damages for the wrongful possession of land.<sup>3</sup> These cases seek the return of vast

<sup>2</sup> Attorneys for all of the parties herein have given written consent to the filing of this amicus brief. Copies of the consents have been submitted to the Court with this brief.

<sup>3</sup> A partial list of cases includes: *United States v. Atlantic Richfield*, No. A-75-215 Civ. (D. Alaska), *appeal docketed*, No. 77-3972, 9th Cir., Sept. 6, 1977; *United States v. Maine*, Civ. No. 1966-ND, 1969-ND (D. Me.); *Western Pequot Tribe v. Holdridge Enterprises, Inc.*, Civ. No. H-76-193 (D. Conn.); *Schaghticoke Tribe v. Kent School Corporation*, Civ. Action No. H-75-125 (D. Conn.); *Mashpee Tribe v. New Seabury Corp.*, Civ. No. 76-3190 (D. Mass.), *appeal docketed*, Nos. 78-1272-73-74, 1st Cir., May 1, 3 and 9, 1978; *Chitimacha Tribe v. Harry L. Laws Co.*, Civ. No. 770772-L (W.D. La.); *Oneida Indian Nation v. County of Oneida*, 70-CV-35 (N.D.N.Y.); *Oneida Indian Nation v. New York State Thruway Authority*, 78-CV-104 (N.D.N.Y.); *Seminole Tribe v. Florida*, No. 78-6116-CIV (S.D. Fla.). In addition to these and numerous other pending cases, the United States, through the Department of the Interior, has indicated its intention to recommend the institution of a number of additional actions on behalf of Indian tribes. For example, on July 1, 1977 the Department announced its recommendation that the Justice Department on behalf of St. Regis, Mohawk, Cayuag and Oneida Nation Tribes sue those persons claiming an adverse interest in approximately 272,500 acres of land in upper New York State. Department of Interior News Release dated July 1, 1977. On August 30, 1977 the Department similarly recommended litigation on behalf of the Catawba Indian Tribe for approximately 140,000 acres of land in the Rock Hill, South Carolina area. *Washington Post*, August 31, 1977, at p. A6. In fact, in connection with legislation to

amounts of real property from present owners and the recovery of billions of dollars in damages upon the basis that past acquisitions of Indian tribal land by the defendants or their predecessors in interest were invalid and of no effect.<sup>4</sup> This litigation has been instituted in virtually every instance by either the United States, as trustee for an Indian tribe, or by an Indian tribe itself, or both.

The statute at issue herein, 25 U.S.C. § 194, purporting to govern the allocation of the burden of proof in Indian claims litigation "about the right of property," has never been applied in any reported case prior to the opinion of the Court of Appeals for the Eighth Circuit herein since the time of its original enactment some one hundred and fifty-six years ago.<sup>5</sup> The belated resuscitation of this statute is of great concern to the ALTA and to all persons relying upon the marketability of land titles.

Inasmuch as the events complained of in Indian land claims litigation occurred in the distant past, in many cases almost two hundred years ago, the outcome of the

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extend the statute of limitations provided in 28 U.S.C. § 2415 for commencing Indian claims for monetary damages by the United States, as trustee, the Department indicated that the number of potential claims under review "could amount to well over 1,000." S. Rep. No. 95-236, 95th Cong., 1st Sess. 2 (1977).

<sup>4</sup> Among the more substantial of the claims for land and damages at issue in the pending cases are *United States v. Maine*, *supra*, approximately 12.5 million acres and an estimated \$25 billion in trespass damages; *Chitimacha Tribe v. Harry L. Laws Co.*, *supra*, 7,000 acres of land and \$100,000,000 in damages; *Oneida Indian Nation v. New York State Thruway Authority*, *supra*, approximately 6 million acres and damages exceeding \$12 million.

<sup>5</sup> The opinion itself notes that two previous cases have cited Section 194 but that "... neither case expounds upon the effect the section should be given." 575 F.2d at 631 n.19. *United States v. Sands*, 94 F.2d 156 (10th Cir. 1938); *Felix v. Patrick*, 36 F. 457 (C.C.D. Neb. 1888), *aff'd*, 145 U.S. 317 (1892).

litigation may often rest upon the burden of proof, as it clearly did herein.<sup>6</sup> The Eighth Circuit's sweeping application of Section 194 would suddenly erase in this and other similar cases accepted allocations of the burden of proof which have been developed over the years in courts throughout the country in actions affecting title to real property. This development of the law has contributed substantially to stable and predictable land transfers which are a necessary prerequisite to the informed judgment of attorneys, abstracters, title insurers, government agencies and others who must pass daily upon the state of title to real property.

## INTRODUCTION AND SUMMARY OF ARGUMENT

25 U.S.C. § 194 purports to place the burden of proof upon the "white person" in all trials about the right of property in which "an Indian may be a party on one side" and "a white person on the other," once the Indian establishes a "presumption of title in himself from the fact of previous possession or ownership." The predecessor of Section 194 was first enacted into law in 1822 in the Indian Trade and Intercourse Act of that date and enacted in its present form in the 1834 Indian Trade and Intercourse Act.<sup>7</sup>

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<sup>6</sup> Of course, the application of the burden of proof is frequently critical in any case, as this Court has observed:

Where the burden of proof lies on a given issue is . . . rarely without consequence and frequently may be dispositive to the outcome of the litigation . . . .

*Lavine v. Milne*, 424 U.S. 577, 585 (1976).

<sup>7</sup> As noted by the Eighth Circuit, 25 U.S.C. § 194 is derived intact from Section 22 of the 1834 Indian Trade and Intercourse Act, Act of June 30, 1834, 4 Stat. 729, 733. 575 F.2d at 632 n.20. A complete copy of the 1834 Indian Trade and Intercourse Act is included herein as an Appendix.

In holding that the defendants herein "failed in sustaining their burden of proof under § 194," the Eighth Circuit Court of Appeals applied this statute in two consolidated cases in which an Indian tribe and the United States, as trustee for the tribe, were "on one side" and several natural persons of undetermined race, two corporations and a state were "on the other." Thus, the Eighth Circuit, without articulating any reason for doing so, construed the term "an Indian" as including an Indian tribe and the United States, as trustee for the tribe; and it construed the term "white person" as including, in effect, any person or entity that is not an Indian.

In urging the validity of this construction, the United States and the Omaha Indian Tribe both place primary reliance upon the notion that "... statutes enacted for the protection of Indians should be 'liberally construed, doubtful expressions being resolved in favor of the Indians.'" Brief of the United States in Opposition to the Petitions for Certiorari at 10; Brief of the Omaha Indian Tribe in Opposition at 20-22. Regardless of whether such a "liberal construction" rule might apply in other contexts,\* as this Court has recently noted, it does not apply "in the face of congressionally manifested intent to the contrary . . . ." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975). In the instant case, a review of the language of Section 194, the other provisions of the Act of which it was a part and the surrounding circumstances at the time of its adoption, all

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\* In fact, it has been suggested that the application of the doctrine of liberal construction applicable to bilaterally arranged Indian treaties and agreements should not control the construction applied to unilaterally enacted statutes. Decker, *The Construction of Indian Treaties, Agreements and Statutes*, 5 AM. IND. L. REV. 299 (1977); see also, *United States v. First National Bank*, 234 U.S. 245 (1914).

establish that the Eighth Circuit's sweeping extension of the statute was improper and unwarranted.

Moreover, there is no present need to broadly interpret the scope of Section 194 beyond its terms. At the time of its initial adoption in 1822, Section 194 was an apparent response to the individual Indian's inability to make effective use of the judicial system to protect his right to property. See p. 18 *infra*. However, as the instant case demonstrates, tribal claims to land are undertaken by the federal government or by the tribe itself or by both, with significant resources and competent legal talent.\*

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\* In fact, it cannot be seriously argued that the litigation obstacles that Section 194 was designed to remedy at the time of its enactment still exist today for the individual Indian. Subsequent legislation has been directed toward the assurance of equal opportunity in litigation, premised upon a universal basis and not limited to any particular group. The Civil Rights Act of 1866, 42 U.S.C. §§ 1981-82 (1970), was a watershed in protecting the rights of all of those engaged in the litigation process. The Civil Rights Act goes beyond Section 194 in its extension of these rights not just to racial or ethnic minorities but to "all persons." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976).

## ARGUMENT

### I. Section 194 Does Not Apply To Indian Land Claims In Which The United States Or An Indian Tribe Are A Party Or Parties On One Side.

#### A. By Its Terms, Section 194 Only Applies When "An Indian" Is A Party.

As this Court has recently observed, "[l]ogic and precedent dictate that the starting point in every case involving construction of a statute is the language itself." *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 98 S. Ct. 2370, 2375 (1978). Section 194 applies only when "an Indian may be a party on one side." It further requires that the burden of proof shall rest upon the "white person" once "the Indian shall make out a presumption of title in himself." All of these terms obviously refer to an Indian as an individual. However, the only party plaintiffs in these consolidated cases are the United States, as trustee, and the Omaha Tribe, each asserting a tribal interest in the property at issue.<sup>10</sup>

Traditionally, significant differences have existed between the rights, privileges and interests of an individual Indian on the one hand and an Indian tribe on the other. Both prior to 1834 and thereafter, individual Indians held property separate from any tribal property. See, e.g., *Godfrey v. Beardsley*, 10 F. Cas. 520 (D. Ind. 1841) (No. 5,497); FELIX S. COHEN, *FEDERAL INDIAN LAW*

<sup>10</sup> The District Court found that the United States "derives its interest in this litigation as a Trustee for the Omaha Indian Tribe and their reservation lands reserved to the Tribe pursuant to the Treaty of 1854." 433 F. Supp. at 68.

With respect to the nature of the tribal plaintiff, the District Court found the Omaha Indian Tribe to be "a duly organized body corporate, established pursuant to its Constitution and Bylaws having been approved by the Secretary of the Interior as provided by law." *Id.*

206-7 (1942); Gilbert and Taylor, *Indian Land Questions*, 8 ARIZ. L. REV. 102, 111-112 (1966). Further, a tribe's authority to sue extends only to claims involving tribal interests and not to the legal or equitable claims of individual members of the tribe. See, e.g., *Sioux Tribe v. United States*, 89 Ct. Cl. 31 (1939). Conversely, individual Indians do not have the same interest in tribal land as the tribe and, thus, cannot assert a tribal claim. See, e.g., *Minnesota Chippewa Tribe v. United States*, 315 F.2d 906 (Ct. Cl. 1963).

The Eighth Circuit construed Section 194 as if it provided that in "trials about the right of property in which an Indian or an Indian tribe or the United States may be a party on one side . . . the burden of proof shall rest upon the white person, whenever the Indian or an Indian tribe or the United States shall make out a presumption of title in himself or itself from the fact of previous possession or ownership." Such an expansive interpretation goes far beyond the words actually chosen by Congress because neither the United States, as trustee, nor the Omaha Indian Tribe is "an Indian," nor are they litigating about the individually held property rights of an Indian. Inasmuch as the statutory "language itself" is plain and unambiguous, it is clear that it is the duty of the courts to enforce the law as written. *United States v. First National Bank*, 234 U.S. 245 (1914); *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947).

In *First National Bank*, *supra*, this Court was called upon to construe the provisions of a statute which removed restrictions on alienation of real property as respects "mixed blood" Indians, but placed the decision concerning such removal as to "full bloods" in the discretion of the Secretary of the Interior. In rejecting the argument of the United States that the statutory

term "mixed blood Indians" meant Indians of more than half white blood, this Court determined that the "natural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else was meant . . . ." 234 U.S. at 258. The Court reached this result despite the government's urging that to do so would be inconsistent with the underlying purpose of the Act:

If Congress, having competency in mind and that alone, had intended to emancipate from the prevailing restriction on alienation only those who were half white or more, by a few simple words it could have effected that purpose. *We cannot believe that such was the congressional intent, and we are clearly of opinion that the courts may not supply the words which Congress omitted. Nor can such course be induced by any consideration of public policy or the desire to promote justice, if such would be its effect, in dealing with dependent people.*

234 U.S. at 262 (emphasis supplied).

The result should be no different herein. If Congress had intended to extend the provisions of Section 194 more broadly to include an Indian tribe or the United States, it could have done so easily by the addition of a "few simple words." Since Congress chose not to include Indian tribes or the United States in Section 194, clearly "the courts may not supply the words which Congress omitted." 234 U.S. at 262. In other sections of the same Indian Trade and Intercourse Act, Congress did, in fact, expressly extend the Act to include Indian tribes as well as individual Indians. *See pp. 13-14 infra.*

***B. An Analysis Of The Trade And Intercourse Act Of 1834 And The Surrounding Circumstances Indicates That The Singular Term "Indian" Refers To Individual Indians And Not To An Indian Tribe Or To The United States, As Trustee For The Tribe.***

As originally enacted in 1822, the burden of proof section of the Trade and Intercourse Act applied in actions about a right of property in which "Indians" were a party on one side and a white person was on the other.<sup>11</sup> In 1834 Congress changed the application of this statute from trials in which "Indians" were on one side to trials in which "an Indian" was on one side. It is not entirely clear whether the 1822 reference to "Indians" was intended to include tribes, but the 1834 Act made it clear that Congress intended to limit the scope of this section to those cases involving individual Indians litigating about their own rights of property. The United States argues that this change was only to make the "syntax" of Section 194 consistent, inasmuch as the 1822 provision had "shifted uncomfortably between plural and singular terms."<sup>12</sup> Brief of the United States in Opposition to the Petitions for Certiorari at 11. However, it is apparent that Congress in fact chose the more

<sup>11</sup> The 1822 version read in full:

*And be it further enacted*, that, in all trials about the right of property, in which Indians shall be a party on one side and white persons on the other, the burden of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership.

Act of May 6, 1822, § 4, 3 Stat. 682, 683.

<sup>12</sup> *And be it further enacted*, That, in all trials about the right of property, in which *Indians* shall be party on one side and *white persons* on the other, the burden of proof shall rest upon *the white person*, in every case in which *the Indian* shall make a presumption of title in *himself* from the fact of previous possession and ownership.

Brief of the United States in Opposition to the Petitions for Certiorari at 11.

restrictive singular modification in order to eliminate whatever ambiguity may previously have existed. Were syntax the only concern of Congress in 1834 and if it intended the scope of this statute to extend more broadly, the obvious change would have been to have changed "himself" to "themselves" and to have made the statute expressly applicable to "Indian tribes."

Moreover, a review of the various provisions of the 1834 Trade and Intercourse Act indicates that each reference to "an Indian" or "Indian" refers to an Indian individually and not to an Indian tribe or to the United States as trustee for the tribe. When construing a particular word or phrase in one section of a statute, it is important to examine the meaning and use of the same word or phrase in other sections of the statute. *See, e.g., United States v. Cooper Corp.*, 312 U.S. 600 (1941); *United States v. Vargas*, 380 F. Supp. 1162, 1166 (E.D.N.Y. 1974); *see also, United States v. Nunez*, 573 F.2d 769 (2d Cir.), *cert. denied*, 98 S. Ct. 2828 (1978).

Thus, for example, Sections 4, 7 and 8 contain restrictions upon "any person other than an Indian" with respect to living or trading in Indian country. The term "an Indian" clearly refers to an individual since the reference is to "any person."

Section 16 relates to the commission of any crime by a white person which injured or destroyed the property of "any friendly Indian." The section provided that the offender shall be required to pay twice the value of the property to "such friendly Indian" and if the offender could not pay, the sum would be paid by the United States. It was then provided:

That no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property, if he or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence . . . .

Thus, this Section clearly uses "Indian" to describe an individual.

Section 20 refers to the sale of spiritous liquor to "an Indian" and applies to "any white person or Indian" about to introduce liquor into Indian country and authorizes the "places of deposits of such *person* to be searched . . . ." Once again this use shows that the term "Indian" means persons and not tribes.

Finally, Section 25 provides that the criminal laws shall be in force in Indian country with the provision that the laws do not apply "to crimes committed by one Indian against the person or property of another Indian." The references here are clearly to individual Indians. The phrase "crime by one Indian" certainly does not refer to crimes by tribes. Further, the second reference is to crimes against the "person" of another Indian.<sup>13</sup>

Examination of the provisions of various sections of the 1834 Indian Trade and Intercourse Act also demonstrates that Congress did not consider the phrase "an Indian" interchangeable with the phrase "Indian tribe." While certain sections such as Section 22 (the predecessor of Section 194) applied to "an Indian" only, other sections applied more broadly to an "Indian nation" or

<sup>13</sup> *Cf. United States v. Rogers*, 27 F. Cas. 886 (D. Ark. 1845) (No. 16,187); *United States v. Sanders*, 27 F. Cas. 950 (D. Ark. 1847) (No. 16,220). In holding that the exception in Section 25 for crimes committed "by one Indian" against another did not apply to a white man adopted by an Indian tribe, the court in *Rogers*, *supra*, emphasized the racial meaning of the term rather than its significance in a tribal context:

. . . [the] exception is confined to those who, by the usages and customs of the Indians, are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,—of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.

27 F. Cas. at 889.

"Indian tribe". In fact, when the protection provided by certain sections of the 1834 Trade and Intercourse Act was designed to apply *both* to individual Indians and to Indian tribes, Congress so provided.

Thus, Section 9 prohibits the ranging or feeding of cattle and horses "on any land belonging to any Indian or Indian tribe." This Section clearly contemplated a distinction between "an Indian" and an "Indian tribe."

Sections 13, 14 and 15 relate to correspondence or messages with Indians with intent to cause violations of treaties and laws of the United States. In each of these sections there is a reference to correspondence with "any Indian nation, tribe, chief or individual," again evidencing a Congressional recognition of the distinction between tribes of Indians and individual Indians.

Section 17 concerns the taking or destruction of property of persons lawfully in Indian country by Indians. The Section applies to "any Indian or Indians, belonging to any tribe in amity with the United States." This Section also provides for payment to the injured party upon "application to the nation or tribe to which said Indian or Indians" shall belong. Thus, there is a clear distinction between "Indian" and a tribe.

The Congressional decision to limit the scope of Section 194 may be best understood by comparing that section with the section dealing with tribal interests in property as well as by considering the different respective capacities of individual Indians and Indian tribes to litigate at that time. From 1796 until 1834 the Act prohibited a conveyance of lands from "any Indian, or nation, or tribe of Indians" unless the same be made with the consent of the United States. Act of May 19, 1796, § 12, 1 Stat. 469, 472; Act of March 30, 1802, § 12, 2 Stat. 139, 143. In 1834, this prohibition was amended to apply more narrowly to such a conveyance from "any Indian nation or tribe of Indians." Act of

June 30, 1834, § 12, 4 Stat. 729, 730. At the same time, Congress enacted the predecessor of Section 194 in its present form by limiting its application to those cases in which "an Indian" was a party on one side. *See* pp. 11-12 *supra*. Thus, in 1834 Congress appears to have conceived of Section 12 as protective of tribal property rights and Section 22 (Section 194) as protective of a "right of property" owned by an Indian individually.

Moreover, as a general rule in the nineteenth century, without specific legislative authority, tribes could not assert tribal claims in court and were immune from suit by others. *Santa Clara Pueblo v. Martinez*, 98 S. Ct. 1670, 1677 (1978); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); FELIX S. COHEN, *FEDERAL INDIAN LAW* 283-85 (1942). On the other hand, individual Indians were able to litigate about their individual rights in property. *Felix v. Patrick*, 145 U.S. 317 (1892); COHEN, *supra* at 162-64. In restricting the application of the burden of proof statute to individual Indians, Congress may have had this distinction in mind as well.<sup>14</sup>

## II. Section 194 Does Not Apply To Indian Land Claims In Which A Corporate Entity Or State Are A Party Or Parties.

### A. By Its Terms, Section 194 Only Applies When "A White Person" Is A Party.

Section 194 requires for its application not only that "an Indian" be on one side but also that there be "a white person on the other." In the instant case, the defendants having various interests in the 2,900 disputed acres include several natural persons,<sup>15</sup> two corporations, the State of Iowa and the State Conserva-

<sup>14</sup> Our research discloses no specific legislative history concerning the meaning or purpose of Section 194.

<sup>15</sup> No evidence was offered with respect to the racial characteristics of the natural person defendants.

tion Commission. In applying Section 194, the Eighth Circuit Court of Appeals concluded that "white person," as used in the statute, means all "non-Indians" of any kind, including corporate entities, a state and a state agency.<sup>16</sup> This conclusion directly contradicts prior judicial interpretation of the term and the intention of Congress at the time Section 194 was enacted, as well as the clear language of the statute.

Although the term "person" as used in a statute has been interpreted in different ways over the years,<sup>17</sup> the term "white person" as used in 1834 and subsequently has been consistently interpreted by this Court and others as including only those of the Caucasian race. This has been true with respect to the use of this term both in the 1834 Indian Trade and Intercourse Act itself and in other statutes. *United States v. Perryman*, 100 U.S. 235 (1879); *Ozawa v. United States*, 260 U.S. 178, 197 (1922) ("... the words 'white person' were meant to indicate only a person of what is popularly known as the Caucasian race" (Naturalization Acts)); *In Re Ah Yup*, 1 F. Cas. 223 (D. Cal. 1878) (No. 104).

In *Perryman*, this Court interpreted the term "white person" in the Indian Trade and Intercourse Act of 1834 to denote explicitly a Caucasian and no others. The Court there indicated that this was the meaning that term had at the time of its original enactment, and that the term therefore could not be construed merely to

<sup>16</sup> The Eighth Circuit simply found that "the non-Indian claimants were required to assume the burden of proof to show that the Indians no longer had lawful title..." 575 F.2d at 633 (emphasis added). The Court reached this conclusion without any discussion of the term "white person."

<sup>17</sup> In 1822 when the predecessor of Section 194 was first enacted and for many years thereafter the term "person" was construed so as not to include a corporation for purposes of constitutional and statutory analysis. *Monell v. Department of Social Services*, 98 S. Ct. 2018, 2034 (1978).

mean "not an Indian." Section 16 of the 1834 Indian Trade and Intercourse Act provided that whenever a "white person" committed a crime within Indian country and was unable to pay the value of any Indian property taken, the United States was required to compensate the Indian. A Negro was convicted of stealing cattle from an Indian and the Indian instituted an action against the United States for the value of the stolen cattle. In finding the United States to have no liability pursuant to Section 16, this Court stated:

The term "white person," in the Revised Statutes, must be given the same meaning it had in the original act of 1834. Congress had nowhere manifested an intention of using it in a different sense.

100 U.S. at 236.

There is no reason to construe the term "white person" as found in Section 22 of the 1834 Trade and Intercourse Act to have a different meaning than the same term has in Section 16 of the same Act. When the same term is used in different sections of the same statute, it is generally presumed to mean the same thing, absent a clear demonstration of a contrary intent. See, e.g., *United States v. Gertz*, 249 F.2d 662, 665 (9th Cir. 1957); *Meyer v. United States*, 175 F.2d 45 (2d Cir. 1949); see also, *Marks v. United States*, 161 U.S. 297 (1896). Cf., *United States v. Montgomery Ward & Co.*, 150 F.2d 369 (7th Cir.), vacated as moot on other grounds, 326 U.S. 690 (1945) (It is a heavy burden to show that same word has a different meaning either in the same act or in several acts which are *in pari materia*).

The United States has acknowledged that "white person" as used in Section 16 was intended by Congress to have a "narrow use," but argues that a "narrow use" of the same term in Section 22 served no specific legisla-

tive purpose. Brief of the United States in Opposition to the Petitions for Certiorari at 12. However, the decision of Congress in 1834 to limit the protection afforded to an Indian by Section 194 to trials involving a "white person" on the other side presumably served a "specific legislative purpose," for there is evidence that the problems individual Indians then encountered in litigation would usually have arisen when a "white person" was "on the other side." See, e.g., J. APPLETON, RULES OF EVIDENCE 271-80 (1860). In ascertaining Congressional intent in the context of interpreting Indian legislation, the legislation ". . . cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

The government seems to be saying that Section 194 is an anachronism premised upon a suspect racial classification—"white person." In effect, the government contends that the scope of Section 194 should be judicially transformed to mean "non-Indians" of any kind so that this 1834 anachronism can be applied to the changed world of 1978 where land is held by human beings of all races and by corporations, partnerships, syndicates, trusts, states, and other entities. According to the government, such a transformation would be "far more consistent with Congress' protective policies." Brief of United States in Opposition to Petitions for Certiorari at 12-13. However, "[t]he responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws." *First National Bank, supra*, 234 U.S. at 260.

**B. *An Analysis Of The Trade And Intercourse Act Of 1834 And The Surrounding Circumstances Indicates That The Term "White Person" Does Not Include All Non-Indian Persons And Entities.***

An examination of other sections of the 1834 Trade and Intercourse Act indicates that when Congress determined to extend the scope of various provisions of the Act beyond a "white person" to include any person other than an Indian (all "non-Indians"), it did so in precisely that language. Section 4 provided that "any person other than an Indian" who attempted to reside in Indian country as a trader without license would suffer a penalty and forfeit goods. Sections 7 and 9 imposed a forfeiture of certain monies upon "any person other than an Indian" for trading a gun, trap or other article commonly used in hunting or hunting in Indian country. In the same fashion, Section 9 prohibited "any person" from driving cattle upon land "belonging to any Indian or Indian tribe."<sup>18</sup>

These provisions again indicate deliberate Congressional attention to the language utilized and rebut any argument that "white person" should be construed to mean "any person or entity other than an Indian." There is no basis to expand "white person" to mean all "non-Indians," including a state, corporate entities and persons of undetermined race.

<sup>18</sup> Similarly, courts have construed the word "person" as used in the 1834 Trade and Intercourse Act as including individual Indians because of indications in other parts of the Act that when Congress intended differently, it so provided:

Other considerations make it probable that this word person was used in this section [20] with intent to include Indians. In other sections of the act (sections 7 and 8, 4 Stat. 729), the intention not to include Indians in the word person is manifested as follows: "If any person other than an Indian shall," etc.

*United States v. Shaw-Mux*, 27 F. Cas. 1049 (D. Ore. 1873) (No. 16,268).

### III. Conclusion.

Section 194 is on its face an anachronism. The scope of this anachronism was erroneously extended by the Eighth Circuit in applying the statute in litigation in which the United States, as trustee, and an Indian tribe are parties on one side and various landowners, including corporations and a state are on the other. Neither the language of Section 194 itself, nor the 1834 Indian Trade and Intercourse Act of which it is a part, nor precedent supports such a result.

Respectfully submitted,

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Dated: December 28, 1978

## APPENDIX

## APPENDIX

## INDIAN TRADE AND INTERCOURSE ACT OF 1834

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

SEC. 2. *And be it further enacted,* That no person shall be permitted to trade with any of the Indians (in the Indian country) without a license therefor from a superintendent of Indian affairs, or Indian agent, or sub-agent, which license shall be issued for a term not exceeding two years for the tribes east of the Mississippi, and not exceeding three years for the tribes west of that river. And the person applying for such license shall give bond in a penal sum not exceeding five thousand dollars, with one or more sureties, to be approved by the person issuing the same, conditioned that such person will faithfully observe all the laws and regulations made for the government of trade and intercourse with the Indian tribes, and in no respect violate the same. And the superintendent of the district shall have power to revoke and cancel the same, whenever the person licensed shall, in his opinion, have transgressed any of the laws or regulations provided for the government of trade and intercourse with the Indian tribes, or that it would be improper to permit him to remain in the Indian country. And no trade with the said tribes shall be carried on within their boundary, except at certain suitable and convenient places, to be designated from time to time by the superintendents, agents, and sub-agents, and to be inserted in the license. And it shall be

the duty of the persons granting or revoking such licenses, forthwith to report the same to the commissioner of Indian affairs, for his approval or disapproval.

SEC. 3. *And be it further enacted*, That any superintendent or agent may refuse an application for a license to trade, if he is satisfied that the applicant is a person of bad character, or that it would be improper to permit him to reside in the Indian country, or if a license, previously granted to such applicant, has been revoked, or a forfeiture of his bond decreed. But an appeal may be had from the agent or the superintendent, to the commissioner of Indian affairs; and the President of the United States shall be authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected; and no trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

SEC. 4. *And be it further enacted*, That any person other than an Indian who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein without such license, shall forfeit all merchandise offered for sale to the Indians, or found in his possession, and shall moreover forfeit and pay the sum of five hundred dollars.

SEC. 5. *And be it further enacted*, That no license to trade with the Indians shall be granted to any persons except citizens of the United States: *Provided*, That the President shall be authorized to allow the employment of foreign boatmen and interpreters, under such regulations as he may prescribe.

SEC. 6. *And be it further enacted*, That if a foreigner shall go into the Indian country without a passport from

the War Department, the superintendent, agent, or sub-agent of Indian affairs, or from the officer of the United States commanding the nearest military post on the frontiers, or shall remain intentionally therein after the expiration of such passport, he shall forfeit and pay the sum of one thousand dollars; and such passport shall express the object of such person, the time he is allowed to remain, and the route he is to travel.

SEC. 7. *And be it further enacted*, That if any person other than an Indian shall, within the Indian country, purchase or receive of any Indian, in the way of barter, trade, or pledge, a gun, trap, or other article commonly used in hunting, any instrument of husbandry or cooking utensils of the kind commonly obtained by the Indians in their intercourse with the white people, or any other article of clothing, except skins or furs, he shall forfeit and pay the sum of fifty dollars.

SEC. 8. *And be it further enacted*, That if any person, other than an Indian, shall, within the limits of any tribe with whom the United States shall have existing treaties, hunt, or trap, or take and destroy, any peltries or game, except for subsistence in the Indian country, such person shall forfeit the sum of five hundred dollars, and forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and peltries so taken.

SEC. 9. *And be it further enacted*, That if any person shall drive, or otherwise convey any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, such person shall forfeit the sum of one dollar for each animal of such stock.

SEC. 10. *And be it further enacted*, That the superintendent of Indian affairs, and Indian agents and sub-agents, shall have authority to remove from the Indian

country all persons found therein contrary to law; and the President of the United States is authorized to direct the military force to be employed in such removal.

SEC. 11. *And be it further enacted*, That if any person shall make a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or shall survey or shall attempt to survey such lands, or designate any of the boundaries by marking trees, or otherwise, such offender shall forfeit and pay the sum of one thousand dollars. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary to remove from the lands as aforesaid any such person as aforesaid.

SEC. 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. And if any person, not employed under the authority of the United States, shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars: *Provided, nevertheless*, That it shall be lawful for the agent or agents of any state who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claim to lands within such state, which shall be extinguished by treaty.

SEC. 13. *And be it further enacted*, That if any citizen or other person residing within the United States or the

territory thereof, shall send any talk, speech, message, or letter to any Indian nation, tribe, chief, or individual, with an intent to produce a contravention or infraction of any treaty or other law of the United States, or to disturb the peace and tranquility of the United States, he shall forfeit and pay the sum of two thousand dollars.

SEC. 14. *And be it further enacted*, That if any citizen, or other person, shall carry or deliver any such talk, message, speech, or letter, to or from any Indian nation, tribe, chief, or individual, from or to any person or persons whatsoever, residing within the United States, or from or to any subject, citizen, or agent of any foreign power or state, knowing the contents thereof, he shall forfeit and pay the sum of one thousand dollars.

SEC. 15. *And be it further enacted*, That if any citizen or other person, residing or living among the Indians, or elsewhere within the territory of the United States, shall carry on a correspondence, by letter or otherwise, with any foreign nation or power, with an intent to induce such foreign nation or power to excite any Indian nation, tribe, chief, or individual, to war against the United States, or to the violation of any existing treaty; or in case any citizen or other person shall alienate, or attempt to alienate, the confidence of any Indian or Indians from the government of the United States, he shall forfeit the sum of one thousand dollars.

SEC. 16. *And be it further enacted*, That where, in the commission, by a white person, of any crime, offence, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured or destroyed, and a conviction is had for such crime, offence, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed. And if such offender shall be unable to pay a sum at least

equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the treasury of the United States: *Provided*, That no such Indian shall be entitled to any payment, out of the treasury of the United States, for any such property, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence: *And provided, also*, That if such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the treasury, as aforesaid.

SEC. 17. *And be it further enacted*, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or sub-agent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or sub-agent, to make return of his doings to the commissioner of Indian affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury; and, in the mean time, in respect to the property so taken, stolen or destroyed, the United States guaranty, to the party so injured, an eventual indemnification: *Provided*, That, if such injured party, his representative, attorney, or agent, shall, in any way, violate

any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, he shall forfeit all claim upon the United States for such indemnification: *And provided, also*, That, unless such claim shall be presented within three years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong, receive an annuity from the United States, such claim shall, at the next payment of the annuity, be deducted therefrom, and paid to the party injured; and, if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the treasury of the United States: *Provided*, That nothing herein contained shall prevent the legal apprehension and punishment of any Indians having so offended.

SEC. 18. *And be it further enacted*, That the superintendents, agents, and sub-agents, within their respective districts, be, and are hereby, authorized and empowered to take depositions of witnesses touching any depredations, within the purview of the two preceding sections of this act, and to administer an oath to the deponents.

SEC. 19. *And be it further enacted*, That it shall be the duty of the superintendents, agents, and sub-agents, to endeavour to procure the arrest and trial of all Indians accused of committing any crime, offence, or misdemeanor, and all other persons who may have committed crimes or offences within any state or territory, and have fled into the Indian country, either by demanding the same of the chiefs of the proper tribe, or by such other means as the President may authorize; and the President may direct the military force of the United States to be employed in the apprehension of such Indians, and also, in preventing or terminating hostilities between any of the Indian tribes.

SEC. 20. *And be it further enacted*, That if any person shall sell, exchange, or give, barter, or dispose of, any spirituous liquor or wine to an Indian, (in the Indian

country,) such person shall forfeit and pay the sum of five hundred dollars; and if any person shall introduce, or attempt to introduce, any spirituous liquor or wine into the Indian country, except such supplies as shall be necessary for the officers of the United States and troops of the service, under the direction of the War Department, such person shall forfeit and pay a sum not exceeding three hundred dollars; and if any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post, has reason to suspect, or is informed, that any white person or Indian is about to introduce, or has introduced, any spirituous liquor or wine into the Indian country, in violation of the provisions of this section, it shall be lawful for such superintendent, Indian agent, or sub-agent, or military officer, agreeably to such regulations as may be established by the President of the United States, to cause the boats, stores, packages, and places of deposit of such person to be searched, and if any such spirituous liquor or wine is found, the goods, boats, packages, and peltries of such persons shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the use of the informer, and the other half to the use of the United States; and if such person is a trader, his license shall be revoked and his bond put in suit. And it shall moreover be lawful for any person, in the service of the United States, or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, excepting military supplies as mentioned in this section.

SEC. 21. *And be it further enacted*, That if any person whatever shall, within the limits of the Indian country, set up or continue any distillery for manufacturing ardent spirits, he shall forfeit and pay a penalty of one thousand dollars; and it shall be the duty of the superintendent of Indian affairs, Indian agent, or sub-agent, within the limits of whose agency the same shall be set up or contin-

ued, forthwith to destroy and break up the same; and it shall be lawful to employ the military force of the United States in executing that duty.

SEC. 22. *And be it further enacted*, That in all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

SEC. 23. *And be it further enacted*, That it shall be lawful for the military force of the United States to be employed in such manner and under such regulations as the President may direct, in the apprehension of every person who shall or may be found in the Indian country, in violation of any of the provisions of this act, and him immediately to convey from said Indian country, in the nearest convenient and safe route, to the civil authority of the territory or judicial district in which said person shall be found, to be proceeded against in due course of law; and also, in the examination and seizure of stores, packages, and boats, authorized by the twentieth section of this act, and in preventing the introduction of persons and property into the Indian country contrary to law; which persons and property shall be proceeded against according to law: *Provided*, That no person apprehended by military force as aforesaid, shall be detained longer than five days after the arrest and before removal. And all officers and soldiers who may have any such person or persons in custody shall treat them with all the humanity which the circumstances will possibly permit; and every officer or soldier who shall be guilty of maltreating any such person while in custody, shall suffer such punishment as a court-martial shall direct.

SEC. 24. *And be it further enacted*, That for the sole purpose of carrying this act into effect, all that part of the Indian country west of the Mississippi river, that is

bounded north by the north line of lands assigned to the Osage tribe of Indians, produced east to the state of Missouri; west, by the Mexican possessions; south, by Red river; and east, by the west line of the territory of Arkansas and the state of Missouri, shall be, and hereby is, annexed to the territory of Arkansas; and that for the purpose aforesaid, the residue of the Indian country west of the said Mississippi river shall be, and hereby is, annexed to the judicial district of Missouri; and for the purpose aforesaid, the several portions of Indian country east of the said Mississippi river, shall be, and are hereby, severally annexed to the territory in which they are situate.

SEC. 25. *And be it further enacted*, That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

SEC. 26. *And be it further enacted*, That if any person who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territories, such offenders may be there apprehended, and transported to the territory or judicial district having jurisdiction of the same.

SEC. 27. *And be it further enacted*, That all penalties which shall accrue under this act, shall be sued for and recovered in an action of debt, in the name of the United States, before any court having jurisdiction of the same, (in any state or territory in which the defendant shall be arrested or found,) the one half to the use of the informer, and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

SEC. 28. *And be it further enacted*, That when goods or other property shall be seized for any violation of this act, it shall be lawful for the person prosecuting on behalf of the United States to proceed against such goods, or other property, in the manner directed to be observed in the case of goods, wares, or merchandise brought into the United States in violation of the revenue laws.

SEC. 29. *And be it further enacted*, That the following acts and parts of acts shall be, and the same are hereby, repealed, namely: An act to make provision relative to rations for Indians, and to their visits to the seat of government, approved May thirteen, eighteen hundred; an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March thirty, eighteen hundred and two; an act supplementary to the act passed thirtieth March, eighteen hundred and two, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved April twenty-nine, eighteen hundred and sixteen; an act for the punishment of crimes and offences committed within the Indian boundaries, approved March three, eighteen hundred and seventeen; the first and second sections of the act directing the manner of appointing Indian agents, and continuing the "Act establishing trading-houses with the Indian tribes," approved April sixteen, eighteen hundred and eighteen; an act fixing the compensation of Indian agents and factors, approved April twenty, eighteen hundred and eighteen; an act supplementary to the act entitled "An act to provide for the prompt settlement of public accounts," approved February twenty-four, eighteen hundred and nineteen; the eighth section of the act making appropriations to carry into effect treaties concluded with several Indian tribes therein mentioned, approved March three, eighteen hundred and nineteen; the second section of the act to continue in force for a further time the act entitled "An act for establishing trading-houses with the Indian tribes, and for other

purposes," approved March three, eighteen hundred and nineteen; an act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," approved thirtieth of March, eighteen hundred and two, approved May six, eighteen hundred and twenty-two; an act providing for the appointment of an agent for the Osage Indians west of the state of Missouri and territory of Arkansas, and for other purposes, approved May eighteen, eighteen hundred and twenty-four; the third, fourth, and fifth sections of "An act to enable to the President to hold treaties with certain Indian tribes, and for other purposes," approved May twenty-five, eighteen hundred and twenty-four; the second section of the "Act to aid certain Indians of the Creek nation in their removal to the west of the Mississippi," approved May twenty, eighteen hundred and twenty-six; and an act to authorize the appointment of a sub-agent to the Winnebago Indians on Rock river, approved February twenty-five, eighteen hundred and thirty-one: *Provided, however,* That such repeal shall not effect [affect] any rights acquired, or punishments, penalties, or forfeitures incurred, under either of the acts or parts of acts, nor impair or affect the intercourse of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi: *And provided also,* That such repeal shall not be construed to revive any acts or parts of acts repealed by either of the acts or sections herein described.

SEC. 30. *And be it further enacted,* That until a western territory shall be established, the two agents for the Western territory, as provided in the act for the organization of the Indian department, this day approved by the President, shall execute the duties of agents for such tribes as may be directed by the President of the United States. And it shall be competent for the President to assign to one of the said agents, in addition to his proper duties, the duties of superintendent for such district of

country or for such tribes as the President may think fit. And the powers of the superintendent at St. Louis, over such district or tribes as may be assigned to such acting superintendent, shall cease: *Provided,* That no additional compensation shall be allowed for such services.

APPROVED, June 30, 1834.